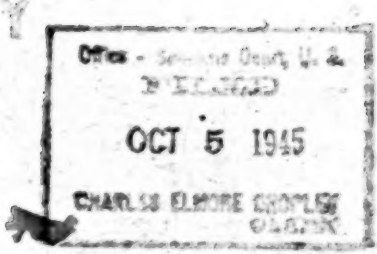

No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1945

ANNA M. BOUTELL AND CARROLL M. BOUTELL, DOING BUSINESS AS F. J. BOUTELL SERVICE COMPANY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 16, 18–20) are not reported. The opinion of the circuit court of appeals (R. 28–32) is reported in 148 F. 2d 329.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 14, 1945 (R. 28). The

petition for a writ of certiorari was filed on May 14, 1945, and granted June 18, 1945 (R. 33). The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners' employees, who are engaged exclusively in repairing and maintaining vehicles of a single interstate motor carrier, are engaged in a "service establishment the greater part of whose * * * servicing is in intrastate commerce" within the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act.

2. Whether employees of a commercial garage, which is not a carrier but is engaged exclusively in repairing and maintaining vehicles of an interstate motor carrier, are "employee[s] with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935" within the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act.

STATUTES INVOLVED

The statutory provisions involved are Sections 13 (a) (2) and 13 (b) (1) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29

U. S. C., sec. 201 *et seq.*, and Section 204 (a) of the Motor Carrier Act of 1935, c. 498, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*

The pertinent portions of the Fair Labor Standards Act read as follows:

> SEC. 13 (a). The provision of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *.
>
> (b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *.

The relevant provision of the Motor Carrier Act read as follows:

> SEC. 204 (a). It shall be the duty of the Commission—
>
> (1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

Similar provisions are made in Section 204 (a) (2) and 204 (a) (3) for the regulation of contract and private carriers, respectively. Other provisions of the Motor Carrier Act referred to in this brief are printed in the Appendix.

STATEMENT

This suit was brought by the Administrator of the Wage and Hour Division to enjoin petitioners from violating the maximum hours provisions of the Fair Labor Standards Act (Sec. 7) (R. 2–4). Petitioners are members of a partnership doing business under the name of the F. J. Boutell Service Company. The partnership operates a place of business in the city of Toledo, Ohio, where it is engaged in the repair and maintenance of the motor transportation equipment owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation, and is an entity separate and distinct from the business involved in the instant case, although the members of the partnership are the sole stockholders of the Drive-Away Company (R. 18–19). Substantially all of the business of the Drive-Away Company has been transportation of goods in interstate commerce. Petitioners' employees involved in this action are mechanics engaged in greasing, repairing, servicing, and maintaining the transportation equipment owned and operated by the Drive-Away Company (R. 19).

The case came up for decision, upon the Administrator's motion for summary judgment on the pleadings, after petitioners had filed an answer admitting that they were not paying overtime compensation in compliance with Section 7 of the Fair Labor Standards Act but asserting that they were exempt from such requirement. The district court held (1) that petitioners' place of business is not a retail or service establishment within the meaning of Section 13 (a) (2) of the Act "since the greater part of its servicing or selling is not in intrastate commerce and since it does not serve the general consuming public" (R. 20); and (2) that petitioners' employees are not employees of a "carrier" and are therefore not subject to the exemption provided in Section 13 (b) (1) of the Act (R. 19–20). The circuit court of appeals affirmed (R. 28). It said that the claim to exemption as a service establishment "is disposed of by the finding of the court and the concession of the appellants that substantially all of the business of the Drive-Away Company is in interstate commerce" (R. 30), and, with respect to the claim of exemption under Section 13 (b) (1), that the wording and legislative history of the Motor Carrier Act and its administrative interpretation demonstrate that Congress did not intend to vest in the Interstate Commerce Commission jurisdiction over employees of other than carriers (R. 32).

SUMMARY OF ARGUMENT

I

An establishment engaged in servicing and repairing the transportation facilities of an interstate carrier is not a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of the exemption provided in Section 13 (a) (2). Unlike the type of establishments contemplated by the exemption, petitioner does not offer its services to the general local consuming public but is operated exclusively for the purposes of a single admittedly interstate business. Furthermore, under the decisions of this Court, employees engaged in the greasing, repairing and servicing of transportation facilities and equipment for use in interstate transportation are engaged "in interstate commerce." And this Court has indicated that employees so engaged are not furnishing service "in intrastate commerce" within the meaning of the 13 (a) (2) exemption. *McLeod* v. *Threlkeld*, 319 U. S. 491.

II

Petitioners' employees are not exempt under Section 13 (b) (1) of the Act, which exempts employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935," because the Commis-

sion's power under that section is limited to employees of carriers and petitioners are not carriers. The entire framework of the Motor Carrier Act, its legislative history and the Interstate Commerce Commission's interpretation of its own jurisdiction, all support the view that Section 204 (a) does not confer jurisdiction over employees of others than carriers. The Interstate Commerce Commission has specifically ruled that it has no jurisdiction over employees in a commercial garage such as that here involved. The legislative history of the Fair Labor Standards Act and its administrative interpretation are likewise contrary to the construction advanced by petitioners.

The fact that the activities of petitioner's employees are closely related to a carrier's operations does not suffice to bring them within the Commission's regulatory power. Likewise, it is immaterial that petitioners' garage employees work only on trucks operated by a carrier corporation whose stock is owned by petitioners. Presumably, petitioners considered it advantageous to avoid the risks of a combined carrier-garage business and it is therefore entirely proper that they be required to assume the burdens of the form of organization they chose. It is wholly consistent with the purposes of the two statutes that the separate organization which excludes regulation of employees' hours by the Commission should have the effect of subjecting the employer to the overtime requirements of the Fair Labor Standards Act.

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ARGUMENT

I

PETITIONERS' EMPLOYEES ARE NOT WITHIN THE EXEMPTION PROVIDED BY SECTION 13 (A) (2) OF THE FAIR LABOR STANDARDS ACT

Section 13 (a) (2) of the Fair Labor Standards Act provides that the minimum wage and overtime provisions of the Act shall not apply to—

> * * * any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.

A. As more fully developed in the Government's brief in *Roland Electrical Co.* v. *Walling*, this Term, No. 45 (br., pp. 17–39), Section 13 (a) (2) was designed to exempt "those regularly engaged in local retailing activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department store" (*Phillips* v. *Walling*, 324 U. S. 490, 497), and "service" establishments regularly engaged in performing services similar to local retailing, like barber shops, filling stations, restaurants and laundries—all establishments which cater to the local consuming public generally. There is no evidence in the legislative history of any intent to exempt servicing which has no resemblance to local retailing but is integrated with and performed exclusively for an admittedly interstate business. On the contrary, the context

of the exemption as well as the statutory policy as a whole and the legislative history, far from showing that petitioners' business is "plainly and unmistakably within [the] terms and spirit" of the exemption (*Phillips* v. *Walling*, 324 U. S. 490, 493), plainly negative any such intent. The cases relied upon by petitioners (pet., pp. 11–15) are not in point as none of them involved an establishment integrated with a single interstate business.[1]

---

[1] The cases of *Ellinger* v. *Goodyear Tire & Rubber Co.*, 40 F. Supp. 626 (N. D. Iowa) and *Bynum* v. *Firestone Tire & Rubber Co.*, 177 S. W. (2d) 20 (C. A. Tenn.) involved ordinary filling stations furnishing tire, greasing, battery, oil, gasoline, polishing, and similar services to individual motor vehicles, most of which were apparently passenger cars. Such service stations which are open to the public generally would ordinarly be within Sec. 13 (a) (2), and in fact are frequently mentioned by the courts as illustrative of the kind of establishment falling within the exemption.

The case of *Walling* v. *Casale*, 51 F. Supp. 520 (S. D. N. Y.), opposes rather than supports petitioners' position. It held that defendant, who leased trucks to manufacturers and who serviced those trucks, was engaged in the "production of goods for commerce" within Sec. 3 (j) of the Act and consequently could not be considered a "service establishment." Petitioners rely upon a dictum in the opinion to the effect that if the trucks were owned and operated by the manufacturers who used them and "if defendant's activities * * * were limited to greasing, repairing and servicing the same, the defense, founded on [Sec. 13 (a) (12)] * * * might be strong enough to bring about a dismissal of the bill." 51 F. Supp. at 526. Whatever weight this dictum might carry with respect to an establishment serving a variety of trucking companies (there were some 60-odd customers who leased the trucks in the *Casale* case), it plainly has no application to an establishment devoted to serving a single interstate transportation company.

Petitioners' establishment has even less resemblance to the type of establishment contemplated by the exemption than that involved in the *Roland Electrical* case, since it does not offer its services to any portion of the general public, but is operated exclusively for the purposes of a single business organization.

B. Both courts below ruled that petitioners failed to satisfy the condition that "the greater part of * * * [its] servicing [be] in intrastate commerce" (R. 20, 30). Since substantially all of the business of the Drive-Away Company, upon whose trucks petitioners' employees work, is admittedly in interstate commerce (R. 19), the employees servicing these trucks are clearly engaged in interstate commerce within the coverage provisions of the Act. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125 (repairing road); *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318 U. S. 740 (repairing bridge); *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572,575 (rate clerk of trucking company); *Hertz Drivurself Stations* v. *United States*, not yet officially reported but printed in 8 Wage Hour Rept. 900 (C. C. A. 8, 1945) (servicing automobiles).

"In interstate commerce," as used in the Fair Labor Standards Act, is as broad as the same phrase in the Federal Employer's Liability Act. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128–129; *McLeod* v. *Threlkeld*, 319 U. S. 491, 495.

This Court has held both acts applicable to work "so closely related to [interstate] commerce as to be in practice and in legal contemplation a part of it." *Pedersen* v. *Delaware L. & W. R. Co.*, 229 U. S. 146, 151; *Overstreet* v. *North Shore Corp.*, *supra*, at 129. Under the Federal Employers' Liability Act, the work of employees engaged in keeping in a proper state of repair and maintenance such instrumentalities as "tracks and bridges" and "engines and cars" for use in interstate commerce was held to be performed in such commerce. See *Pederson* v. *Delaware L. & W. R. Co.*, 229 U. S., at 151; *N. Y. Central R. Co.* v. *Marcone*, 281 U. S. 345, 350. The "repair and maintenance" and the "greasing, repairing, servicing and maintaining" of the transportation equipment in the instant case (R. 19) is similar to the lubricating of engines while in the round house for inspection (see *New York Central R. Co.* v. *Marcone, supra*), and not to the repairing of locomotives withdrawn from service (cf. *N. Y. N. H. & H. R. Co.* v. *Bezue*, 284 U. S. 415).[2]

This Court in *McLeod* v. *Threlkeld* indicated

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[2] In *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 556, the Court declared even with respect to railroad shop employees engaged in making repairs on locomotives and cars withdrawn from service for long periods that "the activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them."

that employees so engaged are not furnishing service in intrastate commerce within the meaning of the 13 (a) (2) exemption.[3] See also *Phillips* v. *Walling*, where this Court emphasized that "Section 13 (a) (2) by its very terms exempts only those employees engaged in a retail or service establishment operating primarily in local commerce" (324 U. S. 490, 496).[4]

Accordingly, petitioners' business does not meet the qualifications for exemption under Section 13 (a) (2) of the Act.

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[3] 319 U. S. 491, 494, fn. 6: "The contention that the work of the employee is covered by the exemption of Sec. 13 (a) (2)—'any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce'—seems without significance. If the work is in interstate commerce, the exemption does not apply. Compare *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101, 106 *et seq.*; *Hanson* v. *Lagerstrom*, 133 F. 2d 120." See also *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walling* v. *Roland Electrical Co.*, 146 F. 2d 745 (C. C. A. 4), pending on writ of certiorari, No. 45 this Term.

[4] In *Martino* v. *Michigan Window Cleaning Co.*, 145 F. 2d 163 (C. C. A. 6), pending on writ of certiorari, No. 21, this Term, upon which petitioners particularly rely (br., pp. 14–16), the court concluded that window cleaning was not interstate commerce or production of goods for commerce and that the window cleaning company was probably exempt as a "service establishment." Whatever the merit of that decision (cf. the Government's brief *amicus* in the *Martino* case), the window cleaners in that case, unlike the employees here involved, were not "engaged in actual work upon [interstate] transportation facilities." *McLeod* v. *Threlkeld*, *supra*.

II

PETITIONERS' EMPLOYEES ARE NOT "EMPLOYEE[S] WITH RESPECT TO WHOM THE INTERSTATE COMMERCE COMMISSION HAS POWER TO ESTABLISH QUALIFICATIONS AND MAXIMUM HOURS OF SERVICE PURSUANT TO THE PROVISIONS OF SECTION 204 OF THE MOTOR CARRIER ACT OF 1935" AND ACCORDINGLY ARE NOT WITHIN THE EXEMPTION PROVIDED BY SECTION 13 (B) (1) OF THE FAIR LABOR STANDARDS ACT

Section 13 (b) (1) of the Fair Labor Standards Act provides that its overtime pay provisions shall not apply to—

> * * * any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935 * * *.

Although the work performed by petitioners' employees may affect the safety of operation of motor vehicles in interstate transportation, they are not employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935" within the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act. For concededly petitioners are not carriers (pet. pp. 18, 22–23). The court below correctly ruled that Section 204 of the Motor Carrier Act of 1935 was intended to give the Commission the power to establish hours

of service for employees of motor carriers only.[5] The entire framework of the Motor Carrier Act, its legislative history, and the Interstate Commerce Commission's interpretation of its jurisdiction, all support the view of the court below that Section 204 (a) does not confer jurisdiction over employees of others than carriers. The legislative history and policy of the Fair Labor Standards Act and its administrative construction confirm the accuracy of this view.

The terminology used throughout the Motor Carrier Act reflects a Congressional purpose to confine its operations to carriers. Section 204 (a) (1) (2) and (3) confer power upon the Commission "to regulate * * * *carriers*" and "to that end" to establish maximum hours of service of employees. Section 202 (a), defining the scope of the Act, states that it applies to "transportation of passengers or property *by motor carriers.*" Section 204 (a) (4a) speaks of "regulation by the Commission of transportation *by motor carriers* engaged in interstate or foreign commerce." Section 204 (c) authorizes the Commission to "investigate whether any motor carrier" has failed to comply with the statute and to issue orders compelling such compliance. Finally, in Section 226,[6]

[5] See *United States* v. *N. E. Rosenblum Truck Lines*, 315 U. S. 50; cf. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422.

[6] This was originally Sec. 225 but was renumbered. 54 Stat. 929.

the Commission is empowered to investigate and report the need for regulation of "maximum hours of service of employees *of all motor carriers and private carriers* of property by motor vehicle."[7] [Italics supplied.]

When the amendment to paragraphs (1) and (2) of Section 204 (a), to include the words giving the Commission power to regulate the maximum hours of service of employees, was proposed, Senator Wheeler, chairman of the Committee on Interstate Commerce and sponsor of the bill, stated that the purpose of their inclusion was "to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of common and contract *carriers.*" 79 Cong. Rec. 5652. [Italics supplied.] Subparagraph (3), providing for regulation of private carriers, was similarly amended so as to give the Commission like authority with respect to "the

[7] In discussing Sec. 204 (a), Senator Wheeler, sponsor of the bill, stated that "the exercise of this power [conferred by Sec. 204 (a)] with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for *regulation of this kind* provided for in section 225." 79 Cong. Rec. 5652. [Italics supplied.] This indicates that Sec. 204 (a) was intended to grant the Commission regulatory powers over exactly the same matters as it was empowered to investigate in Sec. 226; that is, the "maximum hours of service of employees" in Sec. 204 (a) means "maximum hours of service of employees of all motor carriers," as explicitly stated in Sec. 226.

employees of such *operators.*" 79 Cong. Rec. 5652. [Italics supplied.] See also S. Rep. No. 482, 74th Cong., 1st sess., p. 1. Congressional reports and debates in both Houses disclose that the purpose was to regulate motor carriers alone; there is no indication of any intent to regulate hours of workers employed by anyone else.[8]

That the congressional intent was so limited is confirmed by the legislative history of Section 13 (b) (1) of the Fair Labor Standards Act. The parent of the present section first appeared as an amendment to S. 2475, 75th Cong., 1st sess., proposed by Senator Moore, to amend the definition of "employee" in the Act so that its maximum hours provisions would not apply to "any employee of any common carrier by motor vehicle

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[8] Representative Sadowski of the House Committee on Interstate Commerce, in discussing Sec. 204, said that "these provisions as laid down by the Commission must be observed by all motor carriers," and that the Committee "decided to leave maximum hours of service up to the rules of the Commission so that this new legislation would be flexible to meet all the labor situations among the various classes of motor-carrier operators to be regulated." 79 Cong. Rec. 12,205. Representative Pettengill, quoting Commissioner Joseph B. Eastman, generally credited with the authorship of the Motor Carrier Act (see *United States* v. *American Trucking Assns.*, 310 U. S. 534, 538), stated: "The bill * * * gives the Commission authority to prescribe maximum hours of service for the employees of common carriers, contract carriers, and private carriers of property." 79 Cong. Rec. 12,229. To the same effect see the remarks of Senator Couzens, 79 Cong. Rec. 5660, and of Representatives Wadsworth and Crawford, 79 Cong. Rec. 12,198.

subject to the qualifications and maximum hours of service provisions of the Motor Carrier Act, 1935, provided that the wage provisions of this Act shall apply." H. Rep. No. 1452, 75th Cong., 1st sess., p. 11. This language was unchanged through five drafts of the bill, but in the House Committee print of December 14, 1937, 75th Cong., 2d sess., the wording was changed to "any employee with respect to whom the Interstate Commerce Commission has power to prescribe maximum hours of service. * * * *Provided, however,* That the wage provision shall apply to employees of *such carriers* by motor vehicle." [Italics supplied.] That the altered wording was not intended to extend the hours exemption to workers other than employees of carriers is clear from the retention of the proviso. Section 13 (b) (1) in its present form appeared for the first time in the House Committee print of S. 2475, April 15, 1938, 75th Cong., 3d sess., p. 58. The House report indicates that the change in language occurred in the course of adopting a new drafting technique designed to simplify the Act by placing "all of the exemptions in a single exemption section," and that there was no intent to change the original meaning of the exemption. H. Rep. No. 2182, 75th Cong., 3d sess., p. 13.[9]

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[9] "Section 11 of the committee amendment contains the exemptions from the provisions of the act. As stated above, exemptions were made in the Senate bill by the device of excluding the individuals to be exempted from the definition of

The Interstate Commerce Commission has never asserted jurisdiction over the hours of any employees except those of carriers, and has stated specifically that it has no jurisdiction over any employees working in a commercial garage such as that here involved. "By far the larger proportion of the carriers subject to our jurisdiction operate less than 10 vehicles and do not employ mechanics to repair their vehicles, but on the contrary have such work done in commercial garages. *We have, of course, no jurisdiction over employees working in commercial garages.*" [Italics supplied.] *Ex Parte No. MC–2, Maximum Hours of Service of Motor Carrier Employees,* 28 M. C. C. 125, 132; see also *Ex Parte No. MC–3, Motor Carrier Safety Regulations—Private Carriers,* 23 M. C. C. 1, 7–8, 9; *U-Drive-It Co. of Pennsylvania, Inc.* 23 M. C. C. 799; *C. E. Hall & Sons,* 24 M. C. C. 33.

Nothing in the *American Trucking Assns.* case, 310 U. S. 534, or in the decision of *Southland Gasoline Co.* v. *Bayley,* 319 U. S. 44, supports petitioners' contention that the exemption extends to all workers whose work affects safety of operation regardless of whether they are employed by a carrier or a non-carrier (cf. pet., pp. 22–23). On the contrary, both opinions refer throughout

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'employee.' This device seriously complicated the child-labor provisions of the act, inasmuch as the term 'employee' was used in those provisions. Hence the committee has adopted the device of placing all of the exemptions in a single exemption section."

to employees of "carriers" and "motor vehicle operators." 310 U. S. at 553; 319 U. S. at 48–49.[10]

The fact that the activities of the non-carrier are closely related to a carrier's operations and would, if carried on by the carrier, be subject to the jurisdiction of the Interstate Commerce Commission, does not suffice to bring the non-carrier's employees within the Interstate Commerce Commission's power. In construing other provisions of the Motor Carrier Act, this Court, as well as the Interstate Commerce Commission, has ruled that a person engaged in performing services exclusively for a carrier or carriers does not thereby himself become a carrier subject to

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[10] Nor does the case of *Keegan* v. *Ruppert*, 6 Wage Hour Rept. 676 (S. D. N. Y., 1943), principally relied on by petitioners (br., pp. 17–18), lend any support to the contention that employees of non-carriers are also within the exemption. As petitioners point out, the employer there, in contrast to the employer in the instant case, owned the trucks on which the employees worked (br., p. 18), and the opinion shows that the employer's operations and affiliations with various shippers and carriers were quite complicated. Although the basis of its ruling that the exemption applied to the mechanics who worked on the trucks is not entirely clear, the court appears to have assumed that the employer was some kind of "carrier" within the scope of the Motor Carrier Act. See 6 Wage Hour Rept. at 679. See also the subsequent ruling of the Interstate Commerce Commission holding that the employer involved in that case was a contract carrier with respect to its operations of furnishing trucks *with drivers* to shippers. *John J. Casale, Inc.*, 44 M. C. C. 45, 60. Petitioner does not furnish trucks with drivers but simply performs the maintenance and repair work for trucks owned and operated by another.

the jurisdiction of the Commission. See *United States* v. *N. E. Rosenblum Truck Lines*, 315 U. S. 50, where a person engaged in hauling freight, "principally for a single common carrier" (p. 51) was held not to qualify as a "carrier" within the meaning of the Motor Carrier Act, but to be "free to engage in such operations without securing the authorization of the Commission" (at 56). See also *Smythe Contract Carrier Application*, 22 M. C. C. 726, holding that an applicant whose vehicles were leased to and used exclusively in the service of a cartage company (of which applicant was president) was not a "carrier" and was "not performing any service for which authority is necessary under the act" (at 728).

Likewise, it is immaterial that petitioners' garage employees work only on trucks operated by a carrier corporation whose stock is owned by petitioners. Petitioners admit that "the F. J. Boutell Service Company is a separate and distinct entity from the F. J. Boutell Drive-Away Company" (Pet. pp. 14, 16). It is true that petitioners, had they chosen to do so, could have conducted their motor transportation business and their garage business as a single enterprise, and thus brought their garage employees within the jurisdiction of the Interstate Commerce Commission and therefore within the exemption created by Section 13 (b) (1) of the Fair Labor Standards Act. The record does not show petitioners' reasons or motives for organizing their garage and motor transportation as two separate businesses.

Presumably this was done in order to secure advantages which petitioners would not enjoy if these activities were operated as a single business. They "considered it advantageous to avoid the risks" of a single combined carrier-garage organization and "now must bear the burdens" of the form of organization they chose. See *Gray* v. *Powell*, 314 U. S. 402, 414. "The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan" (*ibid.*). See also *Higgins* v. *Smith*, 308 U. S. 473, 477. It is therefore entirely proper, and also wholly consistent with the purposes of the two statutes, that the separate organization which excludes the garage employees' hours from regulation by the Commission should have the effect of subjecting such employees to the overtime provisions of the Fair Labor Standards Act.

The construction advanced by petitioners not only would conflict with the Congressional intent as shown by the legislative history, but would be contrary to the "interpretation of the two administrative agencies concerned with its interpretation, the Interstate Commerce Commission and the Wage and Hour Division * * *." See *United States* v. *American Trucking Assns.*, 310 U. S. 534, 544, 545. "A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'" 310 U. S. at 544. The administrative interpretations are entitled to particular

weight "where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress." 310 U. S. at 549.

"In the face of this course of legislation, coupled with the supporting interpretation of the two administrative agencies concerned with its interpretation" (see *United States* v. *American Trucking Assns., supra,* at 545) it cannot be said that petitioners' employees are "plainly and unmistakably within [the] terms and spirit" of the 13 (b) (1) exemption (see *Phillips* v. *Walling,* 324 U. S. 490, 493).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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OCTOBER 1945.

APPENDIX

The provisions of the Motor Carrier Act of 1935 (49 Stat. 543; 54 Stat. 919; 56 Stat. 300; 49 U. S. C. secs. 301 et seq.) to which reference is made are:

> SEC. 202 (a). The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.
>
> * * * * *
>
> (c). Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
>
> * * * * *
>
> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part 1, an express company subject to part 1, a motor carrier subject to this part, a water-carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection,

or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

SEC. 203 (a). As used in this part—

* * * * *

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by mototr vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part 1, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part 1.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of prop-

erty by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * *

SEC. 204 (a). It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements

are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of sections 204 (c); 205; 220; 221; 222 (a), (b), (d), (f), and (g); and 224.

* * * * *

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this part, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Com-

mission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier under this subparagraph, accompanied by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this part beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this part as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption. Ap-

plications under this subparagraph shall be made in writing to the Commission, verified under oath, and shall be in such form and contain such information as the Commission shall by regulations require.

* * * * *

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

* * * * *

SEC. 226. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter.

U. S. GOVERNMENT PRINTING OFFICE: 1949

SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1945.

Anna M. Boutell and Carroll M. Boutell, Doing Business as F. J. Boutell Service Company, Petitioners,

vs.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 25, 1946.]

Mr. Justice Burton delivered the opinion of the Court.

This suit was brought in the District Court of the United States for the Eastern District of Michigan, by the Administrator of the Wage and Hour Division, United States Department of Labor, to enjoin petitioners from violating the maximum hours provisions[1] of the Fair Labor Standards Act of 1938. 52 Stat. 1060, 29 U. S. C. § 201, *et seq.*

Petitioners are two of four partners doing business as F. J. Boutell Service Company, the other two not being subject to the jurisdiction of the District Court. The four partners are the sole stockholders of the F. J. Boutell Drive-Away Company, a Michigan corporation, engaged in the transportation of automobiles and army equipment in interstate commerce.

The employees of the Service Company involved in this suit are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by

[1] "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063, 29 U. S. C. §207(a).

the Drive-Away Company. The parties have stipulated and the trial court has found that the Service Company is engaged exclusively in rendering such service to the Drive-Away Company and such corporation "is an entity separate and distinct from" the Service Company.

The case presents two questions: (1) whether the employees of the Service Company are "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of the exemption clause, § 13(a)(2)[2]; and (2) whether they come within the exemption clause, § 13(b)(1), which exempts from § 7[3] of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204[4] of the Motor Carrier Act, 1935." 52 Stat. 1068, 29 U. S. C. § 213(b)(1). The District Court ruled against petitioners on both questions and granted the injunction sought by the Administrator. The Circuit Court of Appeals affirmed on both grounds. 148 F. 2d 329. We agree with those conclusions.

The amended findings of fact agreed to by the parties include the statement that the petitioners' employees "involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company. . . ."

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[2] "SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . . ." 52 Stat. 1067, 29 U. S. C. § 213(a)(2).

[3] See note 1 *supra.*

[4] "SEC. 204(a) It shall be the duty of the Commission—

"(1) *To regulate common carriers* by motor vehicle as provided in this part, *and to that end* the Commission may *establish* reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and *maximum hours of service of employees*, and safety of operation and equipment.

"(2) *To regulate contract carriers* by motor vehicle as provided in this part, *and to that end* the Commission may *establish* reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and *maximum hours of service of employees*, and safety of operation and equipment.

"(3) *To establish for private carriers* of property by motor vehicle, if need therefor is found, *reasonable requirements to promote safety of operation, and to that end prescribe* qualifications and *maximum hours of service of employees*, and standards of equipment. . . ." (Italics supplied.) 49 Stat. 546, 49 U. S. C. § 304(a)(1)(2)(3).

No claim is made that these employees are not engaged in interstate commerce within the meaning of § 7 of the Fair Labor Standards Act. They are well within the requirement that they be "actually in or so closely related to the movement of the commerce as to be a part of it." *McLeod* v. *Threlkeld*, 319 U. S. 491, 497.[5]

In answer to the first question, the record shows that these employees do not come within the exemption stated in § 13(a)(2). This is so because their employer, the Service Company, supplies its services, including their services, exclusively to the Drive-Away Company which in turn uses those services in interstate commerce. The Drive-Away Company does not use their services for its own purposes as an ultimate consumer, beyond the end of the flow of goods in interstate commerce. Accordingly, the employees of the Service Company are not engaged in a retail or service establishment within the meaning of § 13(a)(2) as interpreted in *Roland Electrical Co.* v. *Walling*, No. 45, decided Jan. 28, 1946, and *Martino* v. *Michigan Window Cleaning Co.*, No. 21, decided Feb. 4, 1946. Furthermore, substantially all of the servicing done by the Service Company is thus done in interstate commerce, whereas § 13(a)(2) requires the greater part of it to be done in intrastate commerce if the employees rendering it are to be exempted under that provision.

The question whether the employees of the Service Company are to be exempted by virtue of § 13(b)(1) turns upon whether the Interstate Commerce Commission has the "power to establish" maximum hours of service for them under § 204(a)(1)(2) or (3) of the Motor Carrier Act, 1935[6], now officially cited as Part II of the Interstate Commerce Act, 54 Stat. 919, 49 U. S. C. § 301, *et seq.* Whatever may be the precise scope of the Commission's "power to establish" hours of service, we hold that the Commission does not have that power over the men here concerned because the Commission's jurisdiction is limited to employees of "carriers" and the record here shows that the men in question

[5] Overstreet *v.* North Shore Corp., 318 U. S. 120, 130; Overnight Motor Co. *v.* Missel, 316 U. S. 572, 574. See also under the Federal Employers' Liability Act, New York Cent. R. Co. *v.* Marcone, 281 U. S. 345, 349; Pedersen *v.* Del., Lack. & West. R. R., 229 U. S. 146, 150; New York, New Haven & Hartford Railroad Co. *v.* Walsh, 223 U. S. 1, 6. Compare Shanks *v.* Del., Lack. & West. R. R., 239 U. S. 556, 560.

[6] See note 4 *supra*.

are employees of the Service Company, which is not a carrier, rather than of the Drive-Away Company, which is a carrier. This is true although the work these employees do is all supplied to the Drive-Away Company through the Service Company.

The Wage and Hour Division has found to its satisfaction the facts necessary to place these employees of the Service Company under its jurisdiction for the purposes of the Fair Labor Standards Act. The record contains no suggestion that the Interstate Commerce Commission or any other administrative body has found that these employees of the Service Company are or should be treated as employees of the Drive-Away Company for the purposes of the Interstate Commerce Act. This case, therefore, is decided upon the basis that the parties have stipulated and the trial court has found that these employees are employees of the partnership, the Service Company, which is the relationship established for them by the petitioners as their employers. See *Schenley Distillers Corp.* v. *United States*, No. 560, decided January 2, 1946, for a case giving effect to certain other consequences under the Motor Carrier Act of a corporate arrangement chosen by the persons concerned as a means of carrying on their business. See also *Higgins* v. *Smith*, 308 U. S. 473, 477, for a different result under other circumstances.

In the absence of power in the Interstate Commerce Commission to establish the maximum hours of service of these employees, the provisions of the Fair Labor Standards Act as to their maximum hours of employment remain applicable to them.

It appears from the face of the Motor Carrier Act that § 204 refers only to the regulation of "carriers." Moreover, Section 226 of the Act (formerly numbered 225, 54 Stat. 929, 49 U. S. C. § 325), which authorizes investigations by the Commission as a basis for the regulation of the maximum hours of service of employees under § 204, refers only to investigations of the "maximum hours of service of employees of all motor carriers and private carriers of property by motor vericle."[7] The legislative history

[7] "SEC. 225. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and *maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle;* and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special

of the section is reviewed in *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 544-550.

The Interstate Commerce Commission has written many decisions defining the limits of its authority to prescribe qualifications and maximum hours of service for employees of motor carriers under § 204(a)(1)(2)(3), but throughout these decisions it apparently has assumed that its jurisdiction is limited to employees of "carriers" which in turn are under the jurisdiction of the Commission. It has, for example, recognized its power to establish maximum hours of service for automobile maintenance mechanics of "carriers"[8] but at the same time has said—

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knowledge of any such matter." (Italics supplied.) 49 Stat. 566, 49 U. S. C. § 325, renumbered as § 226 by 54 Stat. 929.

In discussing § 204(a)(1)(2)(3) and §225 Senator Wheeler, sponsor of the Bill, said in explanation of it—

". . . . the committee amended paragraphs (1) and (2) to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of *employees of common and contract carriers*, thus restoring provisions that were in the Rayburn bill, introduced in the Seventy-third Congress. . . .

"In order to make the highways more safe, and so that common and contract carriers may not be unduly prejudiced in their competition with peddler trucks and other private operators of motor trucks, a provision was added in subparagraph 3 giving the Commission authority to establish similar requirements with respect to the qualifications and hours of service of the *employees of such operators*. The exercise of this power with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for regulation of this kind provided for in section 225. . . ." (Italics supplied.) 79 Cong. Rec. 5652. See also, p. 5660.

In the House of Representatives, Representative Pettengill read the following observation made by Joseph B. Eastman of the Interstate Commerce Commission—

"The bill . . . gives the Commission authority to prescribe maximum hours of service for the *employees of common carriers, contract carriers, and private carriers of property*. . . ." (Italics supplied.) 79 Cong. Rec. 12,229. See also, S. Rep. No. 482, 74th Cong., 1st Sess. (1935) p. 1.

[8] "Our findings of fact and conclusions of law are as follows:

"*Findings of fact.*—1. That mechanics employed by common and contract carriers and private carriers of property by motor vehicle, subject to part II of the Interstate Commerce Act, devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce. . . .

"*Conclusions of law.*— . . .

"3. That we have power, under section 204(a) of said part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above, [mechanics, loaders and helpers employed by carriers] and that we have no such power over any other classes of employees, except drivers." Ex parte No. MC-2, 28 M. C. C. 125, 138-139. See also Ex parte No. MC-2, 3 M. C. C. 665, 667; 6 M. C. C.

"By far the larger proportion of the carriers subject to our jurisdiction operate less than 10 vehicles and do not employ mechanics to repair their vehicles, but on the contrary have such work done in commercial garages. *We have, of course, no jurisdiction over employees working in commercial garages.*" (Italics supplied.) *Ex parte No. MC-2, In the Matter of Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125, 132.

The Administrator of the Wage and Hour Division of the Department of Labor has interpreted § 13(b)(1) of the Fair Labor Standards Act consistently with the interpretation given to it by the Interstate Commerce Commission.[9] The interpretation of this Act by each of these agencies is entitled to great weight. *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 549.

Throughout the discussion of these sections by this Court in *United States* v. *Amer. Trucking Ass'ns, supra*, and in *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, it is assumed that they refer to employees of "carriers" and of "motor vehicle operators" which are themselves under the jurisdiction of the Interstate Commerce Commission, and there is nothing in either case to indicate an interpretation by this Court that the exemption prescribed in § 13(b)(1) extends to workers whose services affect the safety of operations of motor vehicle carriers but who are not themselves employees of a carrier.

In this view of this case, it is not necessary to determine what kind of a carrier the Drive-Away Company is or even whether it is a carrier within the meaning of the Motor Carrier Act because

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557; 11 M. C. C. 203; Ex parte No. MC-28, Jurisdiction Over Employees of Motor Carriers, 13 M. C. C. 481, 488; Ex parte No. MC-3, Motor Carrier Safety Regulations—Private Carriers, 23 M. C. C. 1, 8.

[9] See Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, originally issued March, 1939, 5th Rev., October, 1943. 2 C. C. H. Labor Law Service, ¶32,109. Where motor vehicle drivers or mechanics are employed by companies engaged in certain types of interstate transportation over which the Interstate Commerce Commission disclaims jurisdiction, they are held to be covered by the Fair Labor Standards Act. For example, if such employees are engaged in the transportation in interstate commerce of consumable goods, such as food, coal and ice, to railroads and docks for use in trains and steamships, jurisdiction over them is disclaimed by the Commission but is accepted by the Wage and Hour Division as covered by the Fair Labor Standards Act. Interpretative Bulletin No. 9, *supra*, Par. 6(b). The Wage and Hour Division also accepts jurisdiction over employees engaged in the transportation of mail in interstate commerce who are employed, not by the carrier, but by a contractor dealing directly with the Post Office Department. *Id.*, Par. 7(b).

the employees involved in this case are not its employees. Similarly, it is not necessary to determine which of the employees of the Service Company do work which affects the safety of the operation of motor vehicles because that classification applies to employees whose hours are regulated by the Interstate Commerce Commission, and not to those whose hours are regulated by the Fair Labor Standards Act.

For these reasons we find that petitioners' employees come within the coverage of the Fair Labor Standards Act of 1938 and not within the exemptions stated in either § 13(a)(2) or § 13(b)(1) of that Act, and the judgment of the Circuit Court of Appeals, therefore, is

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

M. Justice DOUGLAS, dissenting.

I agree that these employees would be covered by the Fair Labor Standards Act but for the exemption contained in § 13(b)(1). That subsection exempts from § 7 of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935."

There is no doubt that the Interstate Commerce Commission has the power to establish qualifications and maximum hours for employees of a carrier who are mechanics engaged in greasing, repairing, servicing, and maintaining its transportation equipment. *In the Matter of Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125. I think that power would still exist if the carrier separately incorporated its garage. This affiliated garage is not like an independent commercial garage. It is still a part of the carrier's business—no more separate or distinct than any other department. The same people own it, operate it, and manage it. If the Interstate Commerce Commission, acting under § 204 of the Motor Carrier Act of 1935, had undertaken to establish the qualifications and maximum hours for these mechanics, I cannot believe that we would allow its jurisdiction to be defeated by that device, whatever may have been the reason for the separate incorporation of the garage. For these

mechanics were, in the practical sense, employees of the carrier after, as well as before, incorporation. And the exemption contained in § 13(b)(1) of the Fair Labor Standards Act is dependent not on the exercise by the Interstate Commerce Commission of its power, but on the existence of that power.[1] The power which Congress granted the Interstate Commerce Commission to establish qualifications and maximum hours for mechanics should not be allowed to be defeated by arrangements between parties which, for certain purposes, may estop them from asserting that two corporations in form are one in substance.

This particular exemption may not be a wise one. But we must take the law as it is written. The policy behind the exemption is defeated, if mere legal forms are allowed to nullify the power of the Interstate Commerce Commission to deal with the problem of safety. As the Commission said, ". . . the carefully supervised work of skilled mechanics is a most important factor in the prevention of accidents, and therefore in the promotion of highway safety." *In the Matter of Maximum Hours of Service of Motor Carrier Employees, supra*, p. 133. We should refuse to whittle down that jurisdiction, even though we thought that the public interest would be better served by broadening the coverage of the Fair Labor Standards Act.

Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE join in this dissent.

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[1] To date the Commission has prescribed qualifications and maximum hours only for drivers. See 49 Code Fed. Reg., Cum. Supp. 1944, Parts 191, 192